No. 3696

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHANG SIM and CHANG YET,

Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

REPLY BRIEF FOR APPELLANTS.

GEO. A. McGOWAN,
550 Montgomery Street, San Francisco,
Attorney for Appellants.

No. 3696

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHANG SIM and CHANG YET,
Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,
Appellee.

REPLY BRIEF FOR APPELLANTS.

These cases were tried before the immigration authorities at the port of admission, the Secretary of Labor at Washington, and the District Court upon the theory that if the relationship were conceded to exist the citizenship or right of admission of these appellants to join their citizen father would follow as a natural consequence. However, upon pages 25 and 26 of appellee's reply brief the contention is advanced that this was an erroneous conclusion, and notwithstanding the citizenship of the father, it did not necessarily follow that his two sons were citizens or otherwise entitled to admission into the country to join their father. As this

injected a new element into the case upon which these appellants had not been heard, our argument before the court was addressed solely upon that point, and in pursuance with the premission given the following brief is submitted thereon.

The political status of Chang Wai Tong, or C. Wai Tong, the father of these appellants, is that he was born in China, was a citizen thereof and remained such until he became a naturalized subject of the Hawaiian Kingdom upon July 19, 1892 (Exhibit "C", pp. 11 and 14). Upon the overthrow of the Hawaiian Kingdom and the establishment of the republic he became a citizen of the Republic of Hawaii, and by virtue of the annexation of Hawaii under the act of April 30, 1900 (31 Stat. L. 141, Sec. 4), he became, and ever since has remained a citizen of the United States.

At the time of Chang Wai Tong's marriage both he and his wife were subjects of the Chinese Empire, and his wife has ever since, and does now, reside in China. Upon the birth of his first child, the appellant Chang Yet, both Chang Wai Tong and his wife were citizens of China, and the child having been born in China, he was undoubtedly a Chinese subject at his birth. The subsequent naturalization of the father made the father a subject of the Hawaiian Kingdom. It is also contended that this naturalization also made his wife a citizen of the Kingdom of Hawaii, even though she was residing in China; hence, when the appellant Chang

Sim, the second son, was born in China his father was already a naturalized subject of the Kingdom of Hawaii, and his mother, by virtue of that naturalization, was herself a citizen of the Kingdom of Hawaii; therefore, it is contended that at the time of Chang Sim's birth, as both of his parents were citizens of the Kingdom of Hawaii, that he takes the political status of his parents at the time of his birth, and hence became at birth a citizen of the Kingdom of Hawaii.

As to the elder son, appellant Chang Yet, it is contended that the change of allegiance of his father and mother from the Chinese Empire to the Kingdom of Hawaii during his infancy likewise changed his political status from that of a subject of China to a subject of the Hawaiian Kingdom. It is further contended that the political allegiance of this entire family changed from the Kingdom to the Republic of Hawaii upon the change of governments in that country. According to the terms of the annexation of the Hawaiian Islands as part and parcel of the United States, Congress provided in Section 4 of the said act as follows:

> "All persons who were citizens of the Republic of Hawaii on August 12, 1898, are hereby declared to be citizens of the Territory of Hawaii."

The attention of the court is directed to the fact that this Section 4 contains no limitation as to race, age, or place of residence, but provides that all persons who were citizens of the Republic of

Hawaii on August 12, 1898, are hereby declared to be citizens of the United States. At that time the appellant Chang Yet was a little over ten years of age, and Chang Sim was a little under four years of age, and it is contended that the absorption into the citizenship of the United States of all the then citizens of the Republic of Hawaii made Chang Wai Tong, his three minor children and their mother citizens of the United States.

On or about August 13, 1907, Chang Wai Tong appeared before the United States Consular representative at Hong Kong and there registered as an American citizen, and registered his wife, Leong Shee, and his three minor children, Chang Yet, then 20 years of age, Chang Sim, then 14 years of age, and Chang Mee, then 4 years of age, as citizens of the United States (see Exhibit "C", page 12). The two elder children are these two appellants.

That persons of the Chinese race who were citizens of the Republic of Hawaii thereafter and upon the annexation of the Hawaiian Islands by the United States of America, became as a result thereof citizens of the United States, has been variously upheld; see "Opinions of Attorneys General", Volume 23, page 345, and also page 352, wherein this is upheld by the then Attorney General, John W. Griggs; also see from the same volume, pages 509 and 511, where the same position is upheld by the then Attorney General, Philander C. Knox. The leading case upon this point is that decided in the

United States District Court of Hawaii on August 13, 1901, reported in Estee's Reports, U. S. District Court of Hawaii, Volume 1, page 118, in *U. S. v. Ching Tai Sai* and *U. S. v. Ching Tai Sun,* wherein the learned district judge, Morris M. Estee, held in favor of their American citizenship.

By reference to the Civil Laws of Hawaii, published in 1897, which is not a separate enactment, but is a compilation of the then existing laws, including the Constitution of the Republic of Hawaii, we find the following provisions which are important to this case. On page 6 is contained Article 17 of the Constitution on citizenship, Section 1 being as follows:

> "All persons born or naturalized in the Hawaiian Islands, and subject to the jurisdiction of the republic are citizens thereof."

Judge Estee, in his decision in the cases mentioned above, states with respect to this section of the Constitution as follows:

> "In arriving at an interpretation of the above section of the Constitution of the Republic of Hawaii we are aided by the construction given to the Constitution of the United States which has a provision in almost the exact terms of that of the Constitution of Hawaii, namely—the Fourteenth Amendment. * * *"

By reference to page 447 of the Civil Laws of Hawaii we find Sections 1109 and 1110, which have a material bearing upon the point here involved. The sections follow:

"1109. The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except as otherwise expressly provided by the Hawaiian Constitution or laws, or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage, provided, however that no person shall be subject to criminal proceedings except as provided by the Hawaiian laws.

"1110. The several Courts of Record shall have power to decide for themselves the constitutionality and binding effect of any law, ordinance, order or decree, enacted or put forth by the President, the Legislature, the Cabinet, or any executive board or bureau of the Government. The Supreme Court shall have the power to declare null and void any such law, ordinance, order or decree as may, upon mature deliberation, appear to it to be contrary to the Constitution, or opposed to the law of Nations, or any existing treaty with a foreign power; provided, that such decision shall be rendered in open court after the parties interested shall have had an opportunity to be heard thereon."

It will be noted that under the first section the *common law* of England as ascertained by English and American decisions is declared to be the common law of the Hawaiian Islands, and further, in the second section that the Supreme Court of the Hawaiian Islands shall have power to declare null and void any such law, ordinance order or decree as might be contrary to the Constitution, *"or opposed to the law of Nations"*.

It is the Government's contention in these cases that there is no equivalent in the Hawaiian laws to Section 1993 of our Revised Statutes, which is as follows:

> "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States",

and that hence these appellants are not citizens of the United States. We call attention to the fact that Section 1993 of the Revised Statutes was but a revision of the earlier law upon that subject, and refer to the act of Congress of March 26, 1790, ch. 3 (1 Stat. L. 103), the third subdivision having to do with the foreign born children of American citizens, wherein it is legislated as follows:

> "The children of citizens of the United States that may be born beyond sea, or out of the limits of the United States, shall be considered as natural-born citizens; provided that the right of citizenship shall not descend to persons whose fathers have never been resident in the United States."

Five years later by the act of January 29, 1795, ch. 20 (1 Stat. L. 414), this was amended as follows:

> "The children of citizens of the United States that may be born out of the limits and jurisdiction of the United States, shall be considered as natural-born citizens; provided, that the right

> of citizenship shall not descend to persons whose fathers have never been resident in the United States",

and Congress again, seven years later, by the act of April 14, 1802, ch. 28 (2 Stat. L. 155), Section 4, legislated as follows:

> "The children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject by the government of the United States, may have become citizens of any one of the said states under the laws thereof, being under the age of twenty-one years at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States; and the children of persons who now are, or have been citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States; provided, that the right of citizenship shall not descend to persons whose fathers have never resided within the United States."

Appellants contend that the principle of law set forth in the enactments of 1790, 1795, 1802, and the Revised Statutes of 1855, was but the placing and continuing upon our statute books of a well and clearly defined principle of the common law as the same had developed and been changed up to the time of the establishing of our country, and also the law of Nations, that a minor child shall take the citizenship of its father, which doctrine also, of course, applied to the wife, whose political status is always regarded as that of her husband.

The development of the ruling law of England upon this subject is thusly set forth in *Blackstone,* Book 1. page 373, Section 505-6, British Subjects Born Abroad, from which I quote as follows:

> "* * * To encourage, also, foreign commerce, it was enacted by statute 25 Edw. III, st. 2 (British Subject, 1350), that all children, born abroad, provided *both* their parents were at the time of the birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England: and accordingly it hath been so adjudged in behalf of merchants. But by several more modern statutes these restrictions are still further taken off: so that all children born out of the king's ligeance, whose *fathers* (or grandfathers by the father's side) were natural-born subjects, are now deemed to be natural-born subjects themselves, to all intents and purposes; unless their said ancestors were attainted, or banished beyond sea, for high treason; or were at birth of such children in the service of a prince at enmity with Great Britain. * * *"

The English law upon the question is most ably expounded by Mr. Justice Gray in the case of *U. S. v. Wong Kim Ark* (169 U. S. 649; 18 Sup. Ct. 456), where, on page 465 of the Supreme Court edition, it is held as follows:

> "It has been pertinently observed that, if the statute of Edward III, had only been declaratory of the common law, the subsequent legislation on the subject would have been wholly unnecessary. Cockb. Nat. 9. By the statute of 29 Car. II (1677) c. 6, 1, entitled 'An act for the naturalization of children of his majesty's subjects born in foreign countries during the late troubles,' all persons who at

> any time between June 14, 1641, and March 24, 1660, 'were born out of his majesty's dominions, and whose fathers or mothers were natural-born subjects of this realm,' were declared to be natural-born subjects. By the statute of 7 Anne (1708) c. 5, 3, 'the children of all natural-born subjects, born out of the ligeance of her majesty, her heirs and successors,'—explained by the statute of 4 Geo. II (1731) c. 21, to mean all children born out of the ligeance of the crown of England, 'whose fathers were or shall be natural-born subjects of the crown of England, or of Great Britain, at the time of the birth of such children respectively,' 'shall be deemed, adjudged and taken to be natural-born subjects of this kingdom, to all intents, constructions and purposes whatsoever.' The statute was limited to foreign-born children of natural-born subjects; and was extended by statute of 13 Geo. III (1773) c. 21, to foreign-born grandchildren of natural-born subjects, but not to the issue of such grandchildren; or, as put by Mr. Dicey, 'British nationality does not pass by descent or inheritance beyond the second generation.' See De Geer v. Stone, above cited; Dicey, Confl. Laws, 742."

Mr. Justice Gray begins the preceding paragraph as follows:

> "It has sometimes been suggested that this general provision of the statute of 25 Edw. III was declaratory of the common law. See Bacon, arguendo, in Calvin's Case, 2 How. St. Tr. 585; Westlake and Pollock, arguendo, in De Geer v. Stone, 22 Ch. Div. 243, 247; 2 Kent. Comm. 50, 53; Lynch v. Clarke, 1 Sandf. Ch. 583, 659, 660; Ludlam v. Ludlam, 26 N. Y. 356. * * *"

Thus showing that there is worthy and weighty suggestion that even in the ancient common law

there was reason to believe that in the time of Edward III it was recognized as a principle that the foreign-born child of a citizen took his father's political status. Certainly there can be no questioning the fact that it was a clearly and well defined principle of the English common law as the same had been interpreted by the decisions of English and American courts, and as the laws themselves had progressed up to the time when these two Hawaiian statutes were enacted in 1892, that it was well recognized as the fundamental law of England and the United States that the political status of the foreign-born child followed that of his father.

Now Sections 1109 and 1110 of the Civil Laws of Hawaii hold in force both the common law and the law of Nations. By the common law was not meant the ancient *common law*, but, on the contrary, the common law as developed, modified, changed and added to by the subsequent statutory enactments and English and American decisions which were declared to be the common law of the Hawaiian Islands in all cases except as otherwise expressly provided in the laws of Hawaii. These two sections of the Civil Laws were adopted in 1892 and, of course, had reference to the then existing common law, and international law. The common law of England and the United States had both progressed and developed up to the time in question to the point of recognizing the fact that birth gave the absolute right of citizenship in the person to the country where the birth took place, but it was funda-

mental in both countries that the foreign-born son of a citizen of England, as well as of the United States, was by the then existing law deemed to be a citizen by birth of his father's country. It is quite true that both countries recognized the right of the foreign country wherein the birth took place to consider such a person a native born citizen of that country, but none the less it is fundamental in both English and American law that those two countries recognize the foreign born son as a citizen and subject of the father's country, irrespective of where he was born. The leading case upon this subject is that of *U. S. v. Wong Kim Ark* (169 U. S. 649; 18 Sup. Ct. 456), where, in a wonderfully exhaustive opinion by Mr. Justice Gray is collated many of the decisions of our own courts, as well as the courts of England upon this point.

That foreign born sons of citizens of the United States are themselves citizens thereof has been upheld in the cases, *Ex parte Ng Do Wong* (230 Fed. 751), *Ex parte Wong Foo* (230 Fed. 534), *Ex parte Lee Dung Moo* (230 Fed. 746). The Government did not appeal from these decisions, but caused the matter to be referred to the Hon. T. W. Gregory, the then Attorney General of the United States, and in his opinion, which is dated April 27, 1906, which was given in the matter of *Wong Gim Toon* and *Wong Shing Gim*, he reached the same conclusion. His opinion is remarkably instructive as it covers the whole point involved in this case. He draws upon many of the leading authorities upon interna-

tional law, and other court decisions. The Circuit Court of Appeals for the Ninth Circuit, in the case of *Quan Hing Sun* (254 Fed. 402), likewise upholds the American citizenship of such foreign born Chinese. That this is the law of the United States admits of no question, and it is also the law of England, and was the law of both countries at the time not only of the adoption of the two sections of the Civil Laws of Hawaii herein mentioned, but also at the time of the adoption of the Constitution of the Kingdom of Hawaii. In *2 Corpus Juris,* 779, it is provided as follows:

> "(8) C. By Parentage—1. Children of Citizens—a. In General. The foreign born children of a citizen are themselves citizens. This is the rule not only in the United States where it is expressly provided by statute that all children born out of the limits or jurisdiction of the United States, whose fathers at the time of their birth are citizens thereof, are citizens of the United States, provided that the right of citizenship shall not descend to children whose fathers never resided in the United States, but also in England and some other countries. In the application of this rule it is wholly immaterial whether the parents are citizens by birth or naturalized citizens. * * *"

The muchly cited case of *Ware v. Wisner* (50 Fed. 310) is authority for the proposition that children born abroad whose fathers were at the time of their birth citizens are themselves of the United States. Further upon this point is the case of *Buckley v. McDonald* (33 Mont. 483; 84 Pac. 1114). In Vol. 13, Opinions Attorneys General,

page 89, it is held with respect to foreign born children of citizens that such children are entitled to all the privileges of citizenship but if by the laws of the country of their birth they are subject to its government it is not competent to the United States to interfere with that relation while they continue within the territory of that country or to change the relation to other foreign nations which, by reason of their place of birth, may at the time exist.

The same view as above set forth has also been repeatedly maintained by the British Government, as set forth in said opinion of Mr. Justice Gray in the *Wong Kim Ark* case.

What may have been the exact question here involved was presented to Attorney General John W. Griggs, and was covered by him in the first opinion hereinbefore mentioned, Vol. 23, Opinions Attorneys General, page 345, wherein he states the question as follows:

> "I. Whether a person born in the Hawaiian Islands in 1885 of Chinese parents, who are laborers, and taken to China with his mother in 1890, is entitled to re-enter the Territory of Hawaii, where his father still resides?
>
> "2. Whether the wife and children of a Chinese person, who was naturalized in 1887 in Hawaii and still resides there, are entitled to enter that Territory 'by virtue of the citizenship' of the husband and father?
>
> In the first case the Chinese person claims the right to enter the Territory of Hawaii because he is a citizen of the United States and of the

> Territory of Hawaii by reason of his birth in that territory; and in the second case the Chinese persons claim the same right because the husband and father is a citizen of the United States and of the Territory of Hawaii by force of his naturalization under Hawaiian laws. The exact question, then, upon which I have the honor to deliver to you my opinion is, whether a Chinese person, born or naturalized in the Hawaiian Islands prior to the annexation of that territory, is a citizen of the United States; for * * * I conceive that there can be no doubt under existing law of the right of a citizen of the United States and of his wife and children to enter freely the Territory of Hawaii",

and he thusly disposed of the matter.

In finally submitting this point to the consideration of the court I am firmly convinced of the soundness of the legal proposition that the elder of these two appellants, Chang Yet, though born a citizen of China, became with his father's naturalization as a subject of the Kingdom of Hawaii a subject of that Kingdom, he still being a child of tender years living in his father's house. The naturalization of the husband undoubtedly made his wife a citizen of the Kingdom of Hawaii. Our court decisions upon that point are absolutely controlling and admit of no question. The wife was a person who could have been herself naturalized in that country. Our decisions upon that point are *Kelly v. Owen* (7 Wall. 496; 19 U. S. 283); *Hopkins v. Fachant* (130 Fed. 839; 65 C. C. A. 1); *In re Nicola* (184 Fed. 322; 106 C. C. A. 464); *Leonard v.*

Grant (5 Fed. 11); *U. S. v. Kellar* (13 Fed. 82); *In re Langtry* (31 Fed. 880); *In re Rionda* (164 Fed. 368); *U. S. v. Cohen* (179 Fed. 834); *Mackenzie v. Hare* (239 U. S. 299; 36 Sup. Ct. 106).

From these decisions there is no question to the fact at all that the naturalization of the husband was likewise the naturalization of the wife, and that she became by such naturalization a citizen of the Kingdom of Hawaii. We, therefore, have the condition, that when the younger of these appellants, Chang Sim, was born his parents were both citizens of the Kingdom of Hawaii. It is, therefore, contended that he became by birth a citizen of the Kingdom of Hawaii, and that the change of the government of Hawaii from that of a constitutional monarchy to a republic did not change, but continued in force the Hawaiian citizenship of all of the members of this family. These children were all minors when Hawaii was annexed to the United States, and by the terms of that annexation all the persons who were citizens of the Territory of Hawaii, no matter where resident, were absorbed into and made citizens of the United States, and hence we feel positive that they are all such citizens and entitled to admission into this government, and the act of the father in registering his wife and three minor children as citizens before the United States Consular Representative at Hong Kong on August 13, 1907, when all of these children were yet in their minority, was but in furtherance of his rights as an American citizen for the protec-

tion of himself and the members of his family to place them within the protection of the government of which they were all citizens.

It is, therefore, respectfully submitted that the points herein urged as to the citizenship of these appellants be upheld.

Dated, San Francisco,
November 12, 1921.

Respectfully submitted,

GEO. A. MCGOWAN,
Attorney for Appellants.